PAGE

The Trial Court inadvertently misstated the facts in the Allanwilde case, 248 U. S. 377 5

Only a question of fact is involved in this case, and that fact has been found by both courts against the petitioners 7

The petitioners' own evidence shows that the *Malcolm Baxter, Jr.*, would actually have carried this cargo to Bordeaux if the American Consul at Havana in enforcing the Embargo had not physically prevented her 9

The evidence is uncontradicted that the *Malcolm Baxter, Jr.*, was not only perfectly seaworthy at Havana, but would actually have sailed for Bordeaux if not stopped by the Embargo 17

Under the decision of the Circuit Court of Appeals the petitioners are recovering all the physical damage sustained by the cargo, including both seawater and handling damage, together with a refund of general average deposits and together with fall or loss in market value resulting from delay. Their entire cargo was redelivered to them at New York in the same sound condition as when shipped with the exception of a very small part damaged by seawater and a somewhat larger part damaged by handling of stevedores at Havana. The petitioners are asking this Court to award them additional damages which demonstrably resulted only from the act of the American Consul in enforcing the Embargo by preventing the Schooner from sailing from Havana for Bordeaux 19

List of various errors in the statement of facts in the petition for certiorari 24

PAGE

Summary of facts showing that the extent of unseaworthiness of the *Malcolm Baxter, Jr.*, was so slight that she actually carried this cargo more than 2,000 miles without any seawater damage excepting to a very small part of the cargo. The total amount claimed by petitioners for seawater and handling damage, refund of general average deposits and loss or fall in market value totals only "about one-fourth" (petition, p. 13) of the sum that the petitioners are asking in this Court ... 33

There is no conflict between the decision below and any decision of this Court or of the Circuit Court of Appeals of any other Circuit ... 38

The Henry W. Cramp case (C. C. A. 3) is obviously distinguishable because in that case there was a positive, intentional and wholly unexplained act of deviation by the shipowner in ordering the master of the Schooner to put into the port of Norfolk and not to perform the voyage ... 38

The doctrine of Kish *v.* Taylor, 1912 Appeal Cases 604, has long been well established both in this country and in England and has previously been followed by the Circuit Court of Appeals for both the Second and Fourth Circuits ... 39

Conclusion ... 44

List of Authorities Cited.

	PAGE
Allanwilde Transport Corp. *v.* Vacuum Oil Co., 248 U. S. 377	2, 3, 6, 20, 22
Atlantic Shipping Co. v. Louis Dreyfus & Co., [1922] 2 A. C. 250, 257	20
Henry W. Cramp, Francis McDonald, Claimant, *v.* Albert T. Rosasco (C. C. A. 3)	38
International Paper Co. *v.* The Gracie D. Chambers, 248 U. S. 387	2, 6, 22
Kish *v.* Taylor, 1912 Appeal Cases 604 (House of Lords)	27, 39, 42
Kronprinzessin Cecilie, 244 U. S. 12	4
Standard Varnish Works *v.* The Bris, 248 U. S. 392	2, 22
Turret Crown, 284 Fed. 439 (C. C. A. 4); Cert. Denied 262 U. S. 742	27, 41, 43
Turret Crown, 297 Fed. 766 (C. C. A. 2); cert. denied 264 U. S. 591	27, 41, 42
Willdomino, 272 U. S. 718	28, 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No.....

REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE, and ENGINEERING TIMBER COMPANY, LTD.,

Petitioners,

against

FRENCH OVERSEAS CORPORATION, as Owner of the Schooner *Malcolm Baxter, Jr.*,

Respondent.

IN THE MATTER

of

The petition of FRENCH OVERSEAS CORPORATION, as Owner of the Schooner *Malcolm Baxter, Jr.*, for Limitation of Liability.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Errors and omissions in stating the facts in the petition for certiorari have misled counsel for petitioners into stating and arguing questions which are not raised by the record in this case. Indeed, the entire petition and supporting brief are based on the misapprehension that the respondent relies on a contract provision or exception of

"restraint of princes" or otherwise, whereas the defense actually is that when the embargo was declared further performance became illegal. Both courts below have found concurrently that an embargo was declared which made further performance of the contract by the respondent or the petitioners illegal (R. 310-311; R. 1171). The Circuit Court of Appeals said (R. 1171):

> "The embargo was an unusual exercise of power by the Government, a permanent restraint making the sailing of the ship illegal and therefore impossible, and rendering that illegal which had previously been legal. *Allanwilde Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, *Int. Paper Co.* v. *The Gracie D. Chambers*, 248 U. S. 387, *Standard Varnish Works* v. *The Bris*, 248 U. S. 392.
>
> The contract to carry the cargo to Bordeaux, which after making the repairs the ship was ready to perform, was thus by the embargo rendered illegal and impossible of further performance, entirely independent of any exception or express agreement of the parties."

The trial court also found that the embargo made further performance illegal and impossible. The trial court said (R. 310-311):

> "Before proceeding to take up the question as to whether the unseaworthiness of the 'Baxter', or the embargo placed upon sailing vessels, brought about the abandonment and frustration of the voyage, it is necessary to deal with Claimants' contention that the 'Baxter' made no effort to obtain a clearance from Havana to Bordeaux. It is said that in certain instances sailing vessels were permitted to clear for

points beyond the war zone, and that, inasmuch as a part of the 'Baxter's' cargo was for the French Republic, there is reason to suppose that she too, might have been permitted to go forward, assuming her fitness to do so. There is, however, no proof that exceptions were granted by the Government, or that one would have been granted in this instance.

Captain Creighton was told by the U. S. Consul in Havana that if clearance for Bordeaux were applied for it would be refused. In the absence of any proof other than that now in the record, I shall assume that the embargo was rigidly applied and that the ship would not have been permitted to go on her way."

It is elementary that illegality is an absolute defense entirely irrespective of the presence or absence of any contract provision and this Court, after fully answering the points now made by petitioners, so held in *Allanwilde Transportation Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377. In the *Allanwilde* case, where an embargo order was also involved but where the contract of affreightment did not, as here, contain an exception of restraint of princes, this Court said (248 U. S. 377, 385-386):

"It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting 'restraint of princes, rulers and peoples' and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or trans-

> ported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecilie*, 244 U. S. 12."

That case was remarkably like the present. There (284 U. S. 385):

> "The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the Government precluding a second departure."

There was no finding that that storm was an unusual one for that voyage, during that season. Similarly in the present case there was the unusually "rough and choppy" sea (R. 244-245) and "mild gale" (R. 244, Chief Mate Clapp, Claimants-Appellants' witness) compelling the *Malcolm Baxter, Jr.* to put into Key West and Havana to avoid greater disaster; then the action of the Government precluding a second departure for Bordeaux.

We emphasize all this to show that this Court, after very full consideration of the entire subject matter involved in this case, has already held in three companion cases (248 U. S. 377; 248 U. S. 387; and 248 U. S. 392) that the ab-

sence of liability of a sailing vessel owner, in a case where his vessel cannot clear because of the Sailing Vessel Embargo, does not depend at all on whether or not the shipowner has used due diligence to make his vessel seaworthy on sailing or is entitled to limit its liability.

The real truth of the matter is, as we pointed out in the Circuit Court of Appeals, that the trial court in the present case, after finding as a fact that the Embargo made further performance of the contract illegal, proceeded to an erroneous result only because of an obvious mistake in stating the facts in the *Allanwilde* case decided by this Court (248 U. S. 377) and in assuming that this Court there held that illegality is not a defense unless there is a contract provision as to restraint of princes or otherwise providing specifically that if the contract afterwards becomes illegal the parties are excused from further performing it. The fact is that there was no "restraint of princes" or similar clause in the contract involved in the *Allanwilde* case, and the very point of this Court's decision in the *Allanwilde* case was that such clause was unnecessary if in fact further performance became illegal. The trial court in the present case states in its opinion that it understood that in the *Allanwilde* case, the shipowner was exonerated—because of the "restraint of princes clause" (R. 311) in the bill of lading, which he was entitled to the benefit of because his ship was seaworthy on sailing and "there was no default over which either ship or its owners had any control" (R. 311). The trial court said:

> "Coming now to the frustration of the adventure and the responsibility therefor, *one is confronted*

> *with the 'restraint of princes' clause* and that relating to prepaid freight as contained in the bills of lading. The comprehensive nature and binding effect of such clauses, upon the intervention of governmental embargo, is illustrated by such cases as *Allanwilde Transport Co.* v. *Vacuum Oil Co.*, 248 U. S. 377, and *International Paper Co.* v. *Gracie D. Chambers*, id. 387. In those cases, however, there was no finding that the vessels concerned were unseaworthy for their contemplated voyages. Each ship fulfilled its warranty of fitness; there was no default over which either ship or its owners had any control; and *as a result of these circumstances and the presence of appropriate exceptions in the bills of lading*, the ships were adjudged to be entitled to retain the freight money. Here, the facts are materially different." (Italics ours.)

It appears from the passage above quoted from the *Allanwilde* decision that the trial court was in error when it assumed that there was a restraint of princes clause involved in the *Allanwilde* case, and that that was the ground on which the shipowner was exonerated. The fact was that this Court exonerated the *Allanwilde* on the general ground of supervening illegality although there was nothing in the contract of affreightment on the subject.

It is interesting to observe the effort of the petitioners to avoid the doctrine laid down by this Court in the *Allanwilde* case. Apparently they have found it necessary in order to sustain their argument to ignore the concurrent finding of both lower courts that the further performance of the voyage became illegal. For instance, on page 3 of the Table of Contents and on page 37 of the Brief in Sup-

port of the Petition counsel for petitioners substitute the word "frustrated" for the word "illegal". They say

> "Second Point—The Circuit Court of Appeals erroneously held that the adventure was frustrated by the Governmental embargo."

They then proceed to rely on cases in which absolutely no question of illegality was involved.

In stating the facts in the petition counsel for the petitioners also omit the most important facts which are shown by the uncontradicted evidence and by the testimony of petitioners' own witnesses, namely, that after the schooner had carried the cargo for six hundred miles of the voyage and had put in for repairs those repairs were completed as fast as possible and that on their completion she was in all respects seaworthy and would actually have sailed from Havana for Bordeaux if the embargo had not prevented her.

Counsel for petitioners are in error in stating that:

> "The Courts below have finally disposed of all questions of fact in favor of the petitioners" (Petition, p. 2).

The decision in the present case turned not on a question of law but on a question of fact and that fact has been determined adversely to the petitioners by both courts below. That fact is that the evidence in this case establishes that the cause which prevented the schooner *Malcolm Baxter, Jr.* from actually proceeding to and delivering this cargo at Bordeaux was the refusal of the American Consul at Havana to give her clearance when her master de-

SUBJECT INDEX.

	PAGE
The questions stated and argued do not arise on the Record in this case	1
Errors in statement of facts in petition for certiorari. Defense is based, not on contract exception of "restraint of princes", but on supervening illegality	2
Omission from petition of the most important fact that the lower courts have found concurrently that the levying of the Embargo made further performance by continuing from Havana to Bordeaux both impossible as matter of fact and illegal as matter of law	2
Circuit Court of Appeals' finding	2
Trial Court's finding	2
Omission from petition of the finding that the uncontradicted evidence shows that the master, on sailing from New Orleans, did not intend to deviate	42
The Circuit Court of Appeals merely followed this Court's decision in Allanwilde Transportation Co. *v.* Vacuum Oil Co., 248 U. S. 377, the House of Lords' decision in Kish *v.* Taylor, 1912 Appeal Cases 604, and the decisions in The Turret Crown, 284 Fed. 439 (C. C. A. 4), cert. den. 262 U. S. 742; and The Turret Crown, 297 Fed. 766 (C. C. A. 2), cert. den. 264 U. S. 591	3

manded it. This refusal was based on the embargo order issued by the United States Government against sailing vessels passing through the war zone. We cannot too strongly emphasize the fact that the evidence is uncontradicted that when that clearance was asked for the schooner was seaworthy in all respects to continue to Bordeaux and deliver the cargo. No objection whatever was made by the petitioners to the evidence that the schooner was then seaworthy in all respects. Lloyd's surveyor, Holmes, at Havana, certified on January 9th, 1918:

> "While the Schooner 'Malcolm Baxter, Jr.' was undergoing repairs, and also while loading, I have had her under observation, and can report that the work as recommended in the Surveyor's Report of October 31st, 1917, with one exception, was done in a thorough and satisfactory manner.
>
> The vessel is now quite tight.
>
> The exception mentioned was the unshipping of the rudder; and as this was considered to be unnecessary, the work was not undertaken.
>
> The cargo is stowed in a satisfactory manner, and I hereby certify that in my opinion, on this date, the vessel is in a safe and seaworthy condition to proceed on her voyage" (R. 212-213).

This evidence of surveyor Holmes was received in evidence without objection (R. 173) in consideration of a similar privilege granted the petitioners with reference to another witness and to avoid the formality and expense of taking surveyor Holmes' testimony that the facts recited in his certificate were true (R. 173, 151). Chief Mate Clapp, a witness for petitioners, testified that on completion of the

repairs at Havana, the *Malcolm Baxter* was in every respect in a good, seaworthy condition (R. 252-253). Captain Loveland, also a witness for petitioners, testified that the repairs at Havana were made according to the recommendation of the surveyors and were made as fast as circumstances would allow (R. 267). Captain Creighton, a master of wooden schooners for 32 years (R. 84), also examined the *Malcolm Baxter* at Havana on completion of her repairs and testified that in his opinion she was seaworthy to carry a cargo to Europe (R. 86).

Captain Hupper, a master of wooden schooners for 48 years (R. 115), who assumed command of the *Malcolm Baxter* at Havana, arrived there on December 22, 1917 (R. 116). He examined the *Malcolm Baxter* and testified that she was in a seaworthy condition to make a voyage to Bordeaux (R. 117, 124, 132). Captain Creighton and Captain Hupper applied to the American Consul at Havana for clearance for Bordeaux, the repairs having been completed, and the American Consul refused on the ground that the United States Government had declared an embargo against sailing vessels passing through the submarine zone (R. 88, 100, 101, Captain Creighton; R. 116, Captain Hupper; R. 253, Chief Mate Clapp, a witness for petitioners; R. 44-45, Mr. Sickler; R. 305-6, 310-11, opinion trial court).

The *Malcolm Baxter* not being able, because of the embargo, to clear for Bordeaux, and having waited a reasonable time after completion of repairs for the embargo to lift, sailed from Havana on January 14, 1918, for New York (R. 228).

The petitioners' own evidence is that the *Malcolm Baxter* was stopped at Havana by the American Government.

Claimants' Exhibit 106-A, printed at page 746 of the Record reads in full as follows:

"22 February 1918

FV/CT

Minister of Commerce,
Paris.

We beg to put before you as briefly as possible the details of a demand concerning a lot of goods which we have paid for and *which could not be delivered in France in consequence of the action taken by the American Government.*

We apply to you in order that you may protect important French interests seriously compromised:

The schooner: 'Malcolm Baxter Junior'.

Shipper: Compagnie Franco-Indo-Chinoise, 23 Rue de la Pepiniere, Paris.

Cargo: 500 tons of Maize Starch, and 200 tons of Malt.

Date of Purchase and Payment: June, 1917 (Before prohibition).

Value of the cargo: 1,700,000 francs.

Departed from New Orleans July, 1917.

Called at Key West and Havana.

Stopped by the American Government.

Discharged at New York on 6th February, 1918.

Shippers request:

First: That the French Government interfere with the American Government in order that the goods may be re-shipped (preceding Steamer 'Franklin', 'Matanzas', 'Osage', having loaded different cargoes from various schooners).

Second: Authorization to enter the goods bought and shipped three months before Prohibition (preceding many shipments of Rhum).

We beg you to take our request in consideration, and remain" (Italics ours.)

That Exhibit—Claimants' Exhibit 106-A—was offered in evidence by counsel for petitioner Compagnie Franco-Indo-Chinoise in connection with the testimony of the witness Ehrhardt, who was one of the eight "directors" (R. 539) of the Compagnie-Franco-Indo-Chinoise. Ehrhardt's testimony in connection with that Exhibit is as follows:

"Q. (Handing paper.) I show you also what appears to be a carbon copy which you have produced of a letter addressed to the Ministry of Commerce, February 22, 1918, with a translation annexed, and ask you if that is a carbon copy of one of the letters which you wrote to the Ministry of Commerce, and whether the translation is one which you have just made. A. Yes.

Mr. Maclay: I offer the carbon copy of the letter in evidence, together with the translation.

(The Commissioner: The carbon copy is admitted and marked Exhibit 106, the translation 106-A.)

(The papers were admitted in evidence and marked Exhibits Nos. 106 and 106-A, January 19, 1923, A. G.)" (R. 587, 588).

Claimants' Exhibit 107-A, printed at page 747 of the Record, reads in part as follows:

"Schooner 'Malcolm Baxter, Junior.'

Referring to our telephone conversation we had some days ago, we were informed that you received

a telegram from our correspondent in New York advising that this schooner, *after having called at Havana, received instructions from the American Government not to continue her voyage to France*, but to proceed to New York and discharge her cargo.

We believe that in order to safeguard our interest in this transaction, we should inform the underwriters of the maritime risk as well as the war risk, of this fact."

That Exhibit was dated January 24, 1918, and was signed by the petitioner Compagnie Franco-Indo-Chinoise (R. 589).

Claimant's Exhibit 103-A, printed at page 744 of the Record, reads as follows:

"Minister of Commerce
Industry, Post and
Telegraph

27 February, 1918

To La Compagnie Franco-Indo-Chinoise

By your letter of the 22nd of February, you have explained to me the details of your petition concerning lot of goods paid for, *which have not been delivered in France in consequence of the action of the American Government*.

I beg to inform you that my service of commercial transports is considering the matter which will be submitted at the next meeting of the Comite Executif des Importations."

That Exhibit was offered by the petitioner Compagnie Franco-Indo-Chinoise at page 586 of the Record.

Respondent's Exhibit 78, printed at pages 733 and 734 of the Record, is a letter (offered at page 532 of the Record) dated January 10, 1918, from the Societe Generale de Credit Ind. & Comm. to Messrs. Kountze Bros., New York City, the representative of petitioner Compagnie Franco-Indo-Chinoise (R. 466), reading in part as follows:

> "THE VOYAGE OF THE SCHOONER 'MALCOLM BAXTER JUNIOR' HAVING BEEN INTERRUPTED UPON THE ORDER THE GOVERNMENT OF THE UNITED STATES OF AMERICA, THE SAID SCHOONER HAS BEEN OBLIGED TO GO TO NEW YORK TO DISCHARGE ITS CARGO" (R. 734).

At page 617 of the Record, counsel for petitioner, Compagnie Franco-Indo-Chinoise, stated on the Record:

> "'Malcolm Baxter, Jr.' sailed from New Orleans for Bordeaux, France. The schooner sailed with this cargo in question on board from New Orleans in August, 1917. She put into Key West in leaking condition, and was then sent to Havana, where considerable repairs were made, the cargo was discharged and reloaded and she then proceeded, after other troubles, to New York, *where the voyage was abandoned.*
>
> The Commissioner: She was left abandoned in January, 1918.
>
> Mr. Maclay: I think it was January 28th, 1918, when she arrived at New York."

According to the admission of counsel for the petitioners on the record, therefore, this is not a case where unseaworthiness has prevented a vessel from leaving the loading port so that the contract can be considered as ended before the voyage began.

Even the petitioners' pleadings allege that the voyage began but that it was discontinued on January 14, 1918, by a deviation in sailing from Havana to New York, instead of to Bordeaux, and was finally abandoned at New York. The claims of Compagnie Franco-Indo-Chinoise and the Engineering Timber Co., Ltd., who shipped the starch, malt and lumber and who are the principal claimant-petitioners, allege that after loading the cargo:

> "Thereafter the 'Malcolm Baxter, Jr.' put to sea and started on her voyage to Bordeaux. She did not, however, continue and complete said voyage, but on account of her unseaworthiness on sailing was obliged to put into the port of Havana, where she remained for a considerable period of time and then *deviated to the port of New York.*
>
> After the 'Malcolm Baxter, Jr.'s' arrival at New York, her owner REFUSED TO PERMIT HER FURTHER TO PERFORM HER VOYAGE but declared its intention to abandon the voyage, and required that the libellant discharge and take possession of its cargo at New York" (R. 32, 29).
>
> "The abandonment of the voyage and the *deviation to New York* were caused by the fact of such unseaworthiness" (R. 33, 30).
>
> "There is at the present time some uncertainty as to whether the necessary permission to export the starch can be obtained" (R. 34).

It thus appears from these claimants-petitioners' pleadings that the voyage did not actually stop until the alleged abandonment at New York, and that it did not legally stop until the alleged deviation by sailing from Havana for New York instead of Bordeaux (R. 32).

The remaining claim, that of the French Republic, alleges that

> "The schooner 'Malcolm Baxter, Jr.' put to sea and started on her voyage to Bordeaux, but did not continue and complete said voyage, but on account of her unseaworthiness on sailing was obliged to put into the port of Havana, where she remained for a considerable period of time and then deviated to the port of New York. After the 'Malcolm Baxter, Jr.'s' arrival at New York, her owner REFUSED TO PERMIT HER FURTHER TO PERFORM HER VOYAGE AND DECLARED ITS INTENTION TO ABANDON THE VOYAGE and required that the claimant discharge and take possession of its cargo at New York" (R. 25).
>
> "On account of said unseaworthiness the Schooner put into Havana, deviated to New York and finally abandoned the voyage" (R. 25).

The answer of the French Republic alleged

> "that she put into Key West; that she later deviated to Havana, Cuba, and New York; and that the cargo was discharged and reloaded at Havana" (R. 13).
>
> "It denies that it has any knowledge or information * * * as to the details of the ship's movements between the time she sailed from New Orleans and put in at New York; as to the nature, diligence and expedition of the repairs alleged to have been affected at Havana; as to the time the vessel was ready to proceed to Bordeaux; as to whether clearance was refused by the American Consul" (R. 13-14).

It admits that proceedings have been brought in this Court by the French Republic to recover dam-

ages sustained by reason of the 'Malcolm Baxter, Jr.'s' abandonment of her voyage" (R. 14).

"Thereafter the Schooner 'Malcolm Baxter, Jr.' put to to sea and started on her voyage to Bordeaux. She did not, however, continue and complete said voyage, but on account of her unseaworthiness on sailing was obliged to put into Key West, Florida, Havana, Cuba, and after remaining at either or both of these ports for a considerable time she deviated to the port of New York.

5. After the Schooner 'Malcolm Baxter, Jr.' arrived at New York, her owner, the petitioner, *refused to permit her further to perform her voyage*, declared its intention to abandon the voyage, and required that the claimant take possession of its cargo at New York" (R. 16).

"Tenth: Further answering the petition herein, the claimant alleges that at the time when the 'Malcolm Baxter, Jr.' arrived at New York and abandoned her voyage she was of the value of $195,000" (R. 17).

Moreover, the uncontradicted evidence is that the *Malcolm Baxter* did not stop at New Orleans but sailed 658 miles to Key West, then proceeded to Havana, and then to New York and there redelivered the cargo.

We respectfully submit, therefore, that the statement of counsel for petitioners in their petition and brief that the voyage of the *Malcolm Baxter* was stopped at New Orleans or before the Embargo was levied is unwarranted either by the pleadings or the evidence.

The ability of the *Malcolm Baxter* to proceed on her voyage was a physical fact to be established by evidence.

This fact was so established, as we have shown by the excerpts above. The *Baxter* could not complete her voyage to Bordeaux because she was legally prevented from leaving Havana by the refusal of the American Consul to give clearance to Bordeaux. These facts have been established by evidence and are of course questions of fact, not of law. The hypothetical situations presented in the petitioners' brief as the basis of their elaborate argument, of course, never existed and could never exist under the findings of both courts below. As we have said above, the petitioners have struggled to avoid the necessary consequence of the finding of the District Court and of the Circuit Court of Appeals respecting the refusal of the Consul to grant clearance. So far as we can ascertain from a careful reading of their brief, the petitioners in order to present their case have been forced to ignore it.

Both Courts below have found this as a fact and there is not a scintilla of evidence that the schooner was not perfectly seaworthy when clearance was then asked or that she would not have proceeded on to Bordeaux and delivered the cargo if the embargo had not prevented her. It is thus evident that under the guise of "questions of law" based on an inaccurate and incomplete statement of facts, counsel for petitioners are really attempting in this Court to get around facts which have been found against them by the lower Courts.

Other uncontradicted evidence not even mentioned in the petition for ceritorari is that after the *Malcolm Baxter, Jr.* put in to Key West and was surveyed, the surveyors appointed by Lloyd's agent did not recommend that the voyage be abandoned. On the contrary they recommended

that she be repaired, and continue her voyage. The witness Porter, Lloyd's agent at Key West, who was called by the cargo owners—the petitioners—testified as follows:

> "Q. You recommended that the vessel be repaired and complete her voyage? A. We recommended that she proceed to some nearby Gulf or Atlantic port for repairs.
>
> Q. And you contemplated that the repairs be made? A. It was contemplated, yes, that after repairs were effected that she would proceed.
>
> Q. You saw no reason why repairs could not be made? A. No, sir" (R. 292).

In so far as the witness preferred some American port to Havana, it appears that the only reason that Mr. Porter gave in his telegram to the petitioner for preferring some other port to Havana, was that it would cost more to effect the repairs in Havana than in an American port. See his telegram, French Overseas Corporation's Exhibit "B", printed at page 294 of the Record, where he says:

> "Key West, Fla., Sept. 13th, 1917.
>
> "French Oversea Corporation,
> 120 Broadway, New York City.
>
> 'Malcolm Baxter, Jr.' No doubt repairs can be effected Havana, but dont consider advisable send vessel there account its being a most expensive port to effect repairs, besides liability complications arising through having to bond cargo discharged and stored there while vessel under repairs, being foreign country with arbitrary customs regulations. Stop. If possible secure tow think advisable send 'Baxter' to some Atlantic port for repairs.
>
> Wm. P. Porter, Lloyd's Agent."

The vessel did proceed to Havana to effect repairs. Captain Loveland testified that the repairs were completed at Havana as fast as circumstances would allow, according to the recommendations of the surveyors employed by Lloyd's Agents (Loveland, R. 267).

She was made in all respects seaworthy at Havana to continue the voyage to Bordeaux. As to this the trial court said:

> "The boat was towed to Havana and discharged. Again she underwent extensive repairs of a structural nature. Upon their completion in January, 1918, the vessel was inspected and pronounced seaworthy. A new master having supplanted Loveland, he went to the office of the American Consul in Havana to sign on new members of the crew, and learned of the embargo that had been placed on wooden ships. The ship, therefore, when ready to depart, left for New York" (R. 305-6).

At Havana, on October 31, 1917, surveyors recommended certain repairs and renewals (R. 239-241). The uncontradicted evidence, without objection, is that every one of the requirements in this survey report (which was introduced by petitioners—R. 173, 239) was fully and adequately completed (excepting unshipping the rudder which was held unnecessary and has nothing to do with any damage in this case) before January 9, 1918 (R. 212-213).

Both Courts below have held the respondent liable for all damages flowing from the unseaworthiness and if the petition for certiorari is denied by this Court the petitioners will prove and recover all such damages. Although the petitioners received back their cargo in exactly the same

sound condition as when it was shipped with the exception of a small part which was damaged by seawater and handling, they are asking this Court to give them additional damages which, as a plain matter of fact, they sustained solely because the American Consul at Havana in carrying out the embargo order would not give the master of the schooner his clearance and other ship's papers so that he could proceed on to Bordeaux with his then absolutely seaworthy vessel. But unseaworthiness does not preclude a defense that performance was discontinued because further performance would be illegal and it is clear that neither the Court below nor any other Court has ever so held. The identical proposition now advanced by petitioners was argued by counsel in *Atlantic Shipping Co.* v. *Louis Dreyfus & Co.*, [1922] 2 A. C. 250, 257, a case much relied upon by petitioners. Lord Dunedin considered it during the course of his judgment in that case and disposed of it as follows:

> "It is quite true that the fact of unseaworthiness does not destroy the contract of affreightment *in toto*. Such a doctrine would lead to absurd consequences * * *."

The final conclusion of the trial court was wrong simply because it misapprehended the facts in the controlling case (*Ellamerdale Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377) decided by this Court, and assumed that a restraint of princes clause was necessary to justify a defense on the ground of illegality. The materiality of this mistake of the trial court is shown by its extensive discussion of due diligence to make the vessel seaworthy and its discussion of the right of the petitioners to limit their liability which would

only become issues in this case if the petitioners were relying on a contract exception and not on illegality.

The statement on page 8 of the Petition that

> "Upon the completion of repairs at Havana, no application for a clearance was made on behalf of the schooner 'Malcolm Baxter, Jr.'

is not only unwarranted by the evidence, but is flatly in conflict with an opposite concurrent finding by both Courts below. A similar contention was made by counsel for the petitioners in the trial court, but the fact was there found against them by the Court as follows:

> "Before proceeding to take up the question as to whether the unseaworthiness of the 'Baxter,' or the embargo placed upon sailing vessels, brought about the abandonment and frustration of the voyage, it is necessary to deal with Claimants' contention that the 'Baxter' made no effort to obtain a clearance from Havana for Bordeaux. It is said that in certain instances sailing vessels were permitted to clear for points beyond the war zone, and that, inasmuch as a part of the 'Baxter's' cargo was for the French Republic, there is reason to suppose that she too, might have been permitted to go forward, assuming her fitness to do so. There is, however, no proof that exceptions were granted by the Government, or that one would have been granted in this instance.
>
> Captain Creighton was told by the U. S. Consul in Havana that if clearance for Bordeaux were applied for it would be refused. In the absence of any proof other than now in the record, I shall assume that the embargo was rigidly applied and that the ship would not have been permitted to go on her way" (Opinion, District Court, R. 310-11).

The Circuit Court of Appeals found as follows:

> "The embargo was an unusual exercise of power by the Government, a permanent restraint making the sailing of a ship illegal and therefore impossible, and rendering that illegal which had previously been legal. *Allanwilde Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, *Inst. Paper Co.* v. *The Gracie D. Chamber*, 248 U. S. 387, *Standard Varnish Works* v. *The Bris*, 248 U. S. 392.
>
> The contract to carry the cargo to Bordeaux, which after making the repairs the ship was ready to perform, was thus by the embargo rendered illegal and impossible of further performance, entirely independent of any exception or express agreement of the parties" (R. 1171).

The Circuit Court of Appeals also found:

> "During the making of the repairs at Havana, and on September 29, 1917, the United States Government levied an embargo, which prevented the schooner or any other sailing vessel from clearing for a voyage to Bordeaux or through the submarine zone" (R. 1167).

This finding is of course the most important fact in the case and it has been omitted by counsel for petitioners from the statement of facts in the petition and ignored throughout their argument. This and other equally serious inaccuracies in the facts stated in the petition and accompanying brief show that counsel for petitioners are really trying to attack in this Court the concurrent findings of both Courts below. On the bold assumption that this Court will

reverse the concurrent findings of the lower Courts, counsel for petitioners then proceed to cite decisions and argue the case as if the findings below no longer existed. This Court has often declared that it will not grant certiorari for the purpose of having the evidence reviewed before it to determine whether concurrent findings of fact by the Courts below are sufficiently established. We shall, therefore, not review the evidence in this brief, but we do call the Court's attention to the fact that a granting of the petition will result only in an extended controversy before this Court regarding the sufficiency of the evidence to establish the facts which the Courts below have concurrently found in favor of the respondent.

The entire petition and supporting brief are, as we have indicated, based on the mistaken assumption that the respondent was relying not on illegality but on a special contract provision of "restraint of princes or otherwise". A reading of the opinion of the Circuit Court of Appeals will disclose that no such contract provision is mentioned. Indeed, at pages 4 and 5 of the respondents-appellants brief in the Circuit Court of Appeals, we said:

> "* * * appellants call attention to the fact that they are relying on illegality and not on a contract exception of 'restraint of princes', and also to the fact that the trial court here inadvertently misstated the facts in the *Allanwilde* case (R. 311), in the Supreme Court of the United States, in which also the shipowner was relying on illegality, there being no contract exception. Unseaworthiness does not preclude a defense that performance was discontinued because further performance would be

illegal, and it is clear that the trial court did not mean to so hold. It seems, therefore, that the trial court decided this case on a clear mistake regarding the legal nature of an embargo or Government interdiction and on a misapprehension of the facts in the controlling case decided by the Supreme Court of the United States. The materiality of this mistake of the trial court is shown by its extensive discussion of the question of due diligence to make the vessel seaworthy which would only become an issue if petitioners were relying on a contract exception of negligence and not on illegality."

The following statements, therefore, of counsel for petitioners in their petition and accompany brief are erroneous:

"3. Whether the doctrine of frustration of adventure by 'RESTRAINT OF PRINCES' MAY BE INVOKED BY A PARTY TO A CONTRACT whose breach of the essential warranty of seaworthiness was the proximate cause of bringing the vessel within the operation of the restraint?

The Court of Appeals held THE SHIPOWNER MIGHT INVOKE THE EQUITABLE DEFENSE OF FRUSTRATION not withstanding the fact that the initial unseaworthiness, with which the shipowner was in privity was the sole cause of bringing the vessel within the 'RESTRAINT'" (Petition, p. 3).

• • • • • •

"II. The questions presented 13

A. Can an owner who is not entitled to limit its liability because it is privy to the unseaworthiness of the vessel, nevertheless RELY ON PROVISIONS OF THE SPECIAL CONTRACT OF THE BILL LADING? ..... 13"

(Table of Contents, p. 1.)

* * * * * *

"First Point—The Decision of the Circuit Court of Appeals herein is contrary to the weight of authority, including the decisions of this court, in respect to the effect of a breach of warranty of seaworthiness ON THE SPECIAL CONTRACT OF THE BILL OF LADING ..... 34"

(Table of Contents, p. 3.)

* * * * * *

"1. Whether a breach of the warranty of seaworthiness on sailing, so flagrant as to force both Courts below to refuse to allow the shipowner to limit his liability, has any effect ON BILL OF LADING CLAUSES IN FAVOR OF THE SHIP OWNER, such as the clause allowing him to retain prepaid freight?" (Petition, pp. 2-3).

* * * * * *

"A. Can an owner who is not entitled to limit its liability because it is privy to the unseaworthiness of the vessel, nevertheless RELY ON PROVISIONS OF THE SPECIAL CONTRACT OF THE BILL OF LADING?" (Petition, p. 13).

* * * * * *

"Although the Circuit Court of Appeals held the shipowner, because of its culpable failure to perform its warranty of seaworthiness, not entitled to limit its liability, the court nevertheless HELD THE SHIPOWNER ENTITLED TO RELY ON THE DEFENSE OF RESTRAINTS OF PRINCES AND ALSO ON THE PREPAID FREIGHT CLAUSE OF THE BILL OF LADING" (Petition, pp. 13-14).

* * * * * *

> "THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN IS CONTRARY TO THE WEIGHT OF AUTHORITY, INCLUDING THE DECISIONS OF THIS COURT, IN RESPECT TO THE EFFECT OF A BREACH OF WARRANTY OF SEAWORTHINESS *on the special contract of the bill of lading*" (Brief in Support of Petition, p. 34).
>
> • • • • • •
>
> "The ship and her owner, being THEN UNABLE TO RELY ON ANY CLAUSES IN THE BILLS OF LADING, would be responsible to the cargo for all of the damages for failure to deliver at destination, including the return of the prepaid freight, as the District Court held (R., fol. 936)" (Brief in Support of Petition, p. 41).
>
> • • • • • •

It is thus evident that the case that counsel for the petitioners have stated and argued is not the one that is shown by the Record in this case and that has been passed upon by the two lower Courts.

The statements of counsel for the petitioner at page 5 and elsewhere of the petition and supporting brief, with reference to the extent of unseaworthiness of the schooner, are entirely unjustified by the evidence or findings. For example, on page 5 of the petition, counsel for petitioner states:

> "Both of the lower courts have found that before the voyage commenced the 'Malcolm Baxter, Jr.' was so structurally defective and so unseaworthy as to be incapable of performing the voyage without extensive repairs"

and that the respondent failed—

> "to make any attempt to discover the vessel's condition before she struck ground for the voyage."

The fact is that the Circuit Court of Appeals in its opinion found as follows:

> "The master of the 'Baxter' did not leave New Orleans with the knowledge that he would have to make a port for repairs, but honestly thought he could make the trip in safety, and tried unsuccessfully so to do. The leak was not discovered until after the ship had left New Orleans and anchored at Port Eads, and it was the condition of the ship and intention of her master when she left New Orlaens, and not when she left Port Eads, that is controlling • • •. Even when the ship broke ground at Port Eads, the master was not certain that he would be compelled to seek a port of refuge. To seek a port of refuge, if in the judgment of the master the safety or best interests of crew, ship, or cargo requires it, when a ship is unseaworthy from unfitness of structure, is not a deviation. The *Turret Crown*, 297 Fed. 766.
>
> In the last cited case we followed the House of Lords in *Kish* v. *Taylor* (supra) which was a case of unseaworthiness from unloading and in which case it was held that it is the presence of the peril, and not its cause, which determines the character of the deviation. The Circuit Court of Appeals in the Fourth Circuit also followed *Kish* v. *Taylor*, supra, in *Turret Crown*, 284 Fed. 439. This holding is not inconsistent with the decision of the Supreme Court in *The Willdomino*, 1927 A. M. C. 129, and the House of Lords in *U. S. Shipping Board* v. *Bunge y Born*, (1925) 31 Com. Cas. 118; 23 L. L. Rep. 257, in which cases the deviations were caused by the ships leaving port with insufficient fuel. The distinction is plain. • • • The circumstances under which the

> 'Baxter' put into Key West and Havana were not caused by gross negligence, as that term is used in the opinion in *The Williamino*, supra, because it was not plain when she left New Orleans that deviation was inevitable."

Moreover it is grossly inaccurate for counsel for petitioner to say at p. 5 of their brief that both of the lower Courts have found that

> "The respondent failed to make any attempt to discover the vessel's condition before she broke ground for the voyage (R. pp. 307, 310, 1167, 1168)."

None of the pages of the record cited by counsel for the petitioner support that statement and the fact is that neither court below made such a finding and the evidence is overwhelmingly to the contrary. It is undisputed that the schooner was seaworthy enough so that she actually carried all this cargo more than 2,000 miles from New Orleans to Key West, Havana, and then, after the embargo was declared, to New York and redelivered the cargo to the petitioners in the same sound condition as when shipped, with the exception of a very small amount of sea water damage, together with some damage resulting from handling during discharge of part of the cargo and reloading at Havana. dling damage, refund of general average deposits, fall or

At p. 13 of the petition counsel for the petitioners admit that the entire damage to the cargo as claimed by them which resulted from the unseaworthiness (as distinguished from the embargo) amounts only to "about one-fourth" of the sum which the trial court mistakenly awarded them. When it is observed that the damages awarded by the Cir

cuit Court of Appeals include all sea water damage, handling damage, refund of general average deposits, fall or loss of market value on account of delay resulting from unseaworthiness, etc., it is apparent that the sum awarded by that court is the full amount which the petitioners should be permitted to recover.

At p. 13 of the petition it is said:

> "The result of this modification by the Circuit Court of Appeals of the damages recoverable by the cargo owners is to relieve the owner of the 'Malcolm Baxter, Jr.' from the greater part of the damages sustained by the cargo and to reduce the cargo's recovery from $391,741.26, including interest, to an amount not yet fixed but which is likely to be about one-fourth of that sum."

Counsel for the petitioner are in error in implying on p. 13 of the record that there were any "damages sustained by the cargo" in addition to the damages which they are actually recovering under the decision of the Circuit Court of Appeals in this case. What the petitioners are asking is in fact that the court declare what is not submitted, namely, that there was a total loss of the entire cargo notwithstanding that practically all of it was redelivered to the petitioners at the end of a 2,000-mile voyage, in the same sound condition as when they shipped it.

The cargo was discharged from the *Malcolm Baxter, Jr.* at Pier 15, Brooklyn, and was carefully surveyed by surveyors representing the shippers, cargo owners and underwriters (R. 690-693). It was found that all the cargo of the *Malcolm Baxter* was in the same sound condition as when shipped at New Orleans, excepting some small sea-

water damage and some handling damage from loading and re-loading at Havana merely requiring recoopering or re-bagging.

The two principal items of cargo were starch and malt and these are the two principal items in the final decree below. The amount ($187,569.36) awarded in the final decree to the claimant suing for damages to the starch and malt in fact amounts to a total loss (less salvage by forced sale) of the starch and malt (R. 1075). The fact as found by the Commissioner and confirmed by the trial court was that 3,595 bags out of a total of 4,076 bags of malt were actually delivered by the *Malcolm Baxter* at New York in the same sound condition as when shipped at New Orleans (R. 767) and that 3,766 bags out of a total of 4,000 bags of starch were delivered by the *Malcolm Baxter* at New York in the same sound condition as when shipped (less a small sum for reconditioning 419 slack bags by pouring one into the other to make them full) (R. 692, 767). In other words, sea water damaged only 481 bags of malt and 234 bags of starch. The entire value of the bags damaged by sea water is trivial as compared with the award in the final decree with respect to the malt and starch, which is based on loss of market.

The damage was small appears from the following admission of counsel for petitioner (R. 626):

> "The starch was re-examined in July, and it was found that although all of this except apparently a small matter of about 200 bags of slacks, so-called, were supposed to be sound. On examination, however, it developed that the moisture had penetrated into that and there was a second reconditioning op-

eration. The result of that was a sale of part of the stock as damaged; in other words, the damaged from the second reconditioning was sold at about one cent a pound. That amounted to 35,000 pounds; it was not very large, you see, because the entire shipment consisted of originally about 1,000,000 pounds."

Similarly, all excepting 44 hogsheads (R. 715) of the 916 hogsheads of tobacco shipped (R. 223, 224, 706, 707), were carried to New York and redelivered without any water damage whatever. The 44 hogsheads were damaged "estimated at 25 per cent" (R. 750). The remaining tobacco damage consisted merely of breakage and loosening of staves in the hogsheads (R. 715) and is explained by the fact that 251 of the hogsheads were shipped in bad condition under a foul bill of lading: "Old casks—in bad condition—contents exposed, wet and stained. All recoopered. Ship not responsible for contents" (R. 707).

The steel billets (R. 760) were not damaged at all by sea water or handling, and the lumber (R. 765) and other loose cargo had an inconsequential amount of physical damage.

It is apparent that the total physical damage to cargo amounts to a very small part of the damages awarded by the final decree.

The *Malcolm Baxter* thus carried the cargo more than 2,000 statute miles (Table of Distances, Hydrographic Office, page 144) with only a very small amount of sea-water damage. On the voyage from Havana to New York "she encountered a storm of considerable severity and once more she began to leak" (R. 306), but the master testified that

this leak was "nothing at all because it is only a small amount of water. It would be pumped out so quick" (R. 133). Counsel for petitioners overlook the fact that the "three feet of water in twelve hours" (R. 133) has no significance because it was measured at the bow and at the stern which were both lower than the amidships portion of the schooner because of the much discussed hog. They also overlook the further fact that the small quantity of water which might have found its way into the hold merely filled the interstices between the pieces of lumber, steel billets and various parts of the vessel. Three feet of water measured in this manner obviously did not represent a body of water three feet deep, 45 feet wide and 226 feet long (R. 218) which counsel for appellees apparently assumed leaked into the vessel.

The petitioner, French Republic, alleged in its answer:

> "The claimant alleges that at the time when the 'Malcolm Baxter, Jr.' arrived at New York and absandoned her voyage, she was of the value of $195,000" (R. 17).

The petitioner, Engineering Lumber Company, Limited, and the petitioner, Compagnie Franco-Indo-Chinoise, alleged in paragraph Fifth of their answers as follows:

> "It denies that the value of the said sailing vessel 'Malcolm Baxter, Jr.' at the time alleged in the petition was $80,000 and alleges that the value at that time was $195,000.00" (R. 20, 22).

The time referred to in the petition of the French Overseas Corporation was:

"SIXTH: The value of the sailing vessel 'Malcolm Baxter, Jr.' at the termination of said voyage when the aforesaid embargo prohibited her from continuing the voyage on which she was then engaged, amounted to the sum of Eighty thousand ($80,000) Dollars" (R. 8).

Obviously no schooner unable to perform a voyage or so unseaworthy as counsel for petitioner would have this Court believe, could be worth even in war time any of such large sums as the petitioners themselves allege under oath she was worth.

The fact is that in view of the so-called implied warranty of seaworthiness, even a very slight defect in the schooner would be sufficient to constitute "unseaworthiness" as that term is used by an admiralty court.

In view of the inaccurate and misleading statements of counsel for the petitioners with reference to the extent of the defects constituting unseaworthiness of the *Malcolm Baxter, Jr.*, we call the Court's attention to the following evidence:

The *Malcolm Baxter, Jr.* was a four-masted schooner, built in 1900 at Camden, Maine, with three decks and an elliptic stern; length 226 feet, breadth 45 feet, depth 20.8 feet, gross tonnage 1,732, net tonnage 1,479 (R. 217-218). Ever since she was built she had been maintained at an A-1 classification in the American Bureau of Shipping, the highest classification for wooden vessels. At the end of fifteen years, she was surveyed by the Chief Surveyor for the Classification Society who laid out what her owners must do to obtain a re-classification. After this was done, she was reclassed A-1, the highest rating under a classifica-

tion certificate, good for six years—that is, until the end of the year 1921 (R. 64, 63, 145). On September 14, 1916 (R. 56, 54, 55, 57, 58, 59) her A-1 class was temporarily suspended because of straining on the previous voyage (R. 62). She was put on drydock at Tietjen & Lang's Drydock at Hoboken and thoroughly surveyed by the Chief Surveyor for the American Bureau of Shipping, Captain Proctor (R. 56), and by Surveyor Gardner (R. 194). No rotten wood was found anywhere in her (R. 59, 194). On recommendation of Captain Proctor, she was then practically rebuilt, under the personal supervision of Captain Proctor (R. 56), Captain Gardner (R. 197, 203) and foreman carpenter and joiner Kingley (R. 104), at Tietjen & Lang's shipyard (R. 56 to 59). On completion of this rebuilding, the *Malcolm Baxter, Jr.* was reclassed A-1 under a certificate good until the end of the year 1921. She remained in New York Harbor until June, 1917 (R. 115). She then proceeded to New Orleans, loaded a coal cargo, carried it to Havana, and returned light to New Orleans (R. 113). She sustained no casualty or damage of any sort. She got into no trouble of any kind, between the completion of the rebuilding at Titjen & Lang's in New York and final arrival back in New Orleans light from Havana, after carrying the single cargo of coal (R. 114). In July, 1917, she began loading the present cargo of steel billets, malt, starch, lumber and tobacco. During July, after loading a part of the cargo, mostly steel billets (R. 257), her master, Captain Clark, was relieved as master by Captain Loveland. Loveland continued loading her cargo, she at that time being owned and operated by the Maritime Transportation Company (R. 256). Mr. Green of that Company employed Captain Loveland, and

Mr. Gage of that Company was the ship's agent (R. 256). In the latter part of July, 1917 (R. 49, 51), when she had almost completed loading (R. 41), the petitioner, the French Overseas Corporation, purchased the *Malcolm Baxter, Jr.* subject to the charter party already executed (R. 40, 49, 51) for $172,000. or $175,000. (R. 50), on condition that she was classed A-1 in the American Bureau of Shipping (R. 40, 213-214). After the purchase, some differences arose between the charterer and the petitioner (R. 40). Petitioner, therefore, sent Mr. Sickler, an employee, but not then an officer, of petitioner, to New Orleans to adjust these differences with the charterer (R. 40). He arrived at New Orleans on August 1, 1917 (R. 41). The schooner had then just about finished loading her cargo (R. 41). Mr. Gage, the ship's agent or loading agent for the previous owner, the Maritime Transportation Company, who had been on board the schooner before she was loaded and practically every day during her loading (R. 108), and had had her surveyed by surveyors Japha and Thomsen (R. 109, 110, 204), was taken over as an employee by the petitioner, as ship's agent at New Orleans. After the purchase by petitioner (R. 108), Captain Loveland was also taken over as an employee of petitioner (R. 256). Surveyor Japha of the New Orleans Board of Underwriters surveyed the schooner while loading (R. 109, 204), and on completion issued a certificate of the Bureau of Inspection of the New Orleans Board of Underwriters, dated July 25, 1917, that she had completed loading her cargo under the Board's inspection, and had conformed to all its rules and "that she is now properly laden to proceed on her voyage to French port, Wm. Japha, Surveyor" (R. 204, Trial Exhibit 1). Surveyor Japha died

before this case was reached for trial (R. 151). Surveyor Thomsen testified that he examined the ship before she sailed from New Orleans and that, in his opinion, she was in seaworthy condition to make a trip from New Orleans to France (R. 297). Captain Loveland in his sworn protest, on September 18, 1917, also certified that the schooner was seaworthy on sailing from New Orleans (R. 276, 279, 267, 268). Ship's agent, Gage, testified that he was on board the schooner while Surveyor Japha and Surveyor Thomsen made their surveys (R. 109-110) and was on board practically every day while she was at New Orleans (R. 108), and that the schooner had not been damaged or in any trouble on the voyage to Havana or return (R. 114). President Mayer of the petitioner testified that he had never seen the *Malcolm Baxter, Jr.* and that so far as the Company was concerned, the *Malcolm Baxter, Jr.* was left entirely in the hands of Mr. Carpenter, its Vice-President (R. 191). Vice-President Carpenter testified that the schooner was in fact classed A-1 at the time of purchase (R. 103); that he relied on her rating and had never seen her, and that at his direction one of the Company's employees, Mr. Sickler, was to look after *her* and that he went to New Orleans and did so (R. 103).

If there had been any leak in her of any kind, both Captain Loveland and Chief Mate Clapp, who were called as witnesses by the claimants-appellees, would have known it, as also would the two surveyors, Japha and Thomsen. Neither Loveland nor Clapp was friendly to the petitioner, both voluntarily testifying for the claimants in this proceeding. It is obvious that if there had been any known weakness these men would have disclosed it.

There is not a word of testimony that at any time during the entire voyage from New Orleans until final arrival at New York the pumps were not able to prevent the sea-water coming through the leaks from rising to a height of more than two feet above the floor of the cargo space (R. 251) at any time,—which would not bring it above the steel billets and lumber stowed in the bottom of the holds (R. 251). Chief Mate Clapp, a witness for petitioners, testified that he was unable to say that the leaks had any influence on the bags of starch or malt (R. 250) which formed the principal item of damages awarded by the trial court.

The actual carriage by this schooner of this cargo, over more than 2,000 miles, with only very slight sea water damage, is demonstrative evidence that she was in all except minor respects physically fit to do that which she actually did do, namely, deliver the cargo at the end of a 2,000-mile voyage in the same sound condition as when shipped. The handling damage, which the uncontradicted evidence shows is the principal item of the entire physical damage to cargo, resulted collaterally and independently from negligent acts of stevedores at Havana and, of course, has nothing to do with the question of seaworthiness or unseaworthiness.

In addition to all physical damage of every kind and character that their cargo suffered, the petitioners are also recovering, under the decision of the Circuit Court of Appeals, all fall or loss in market value of their cargo resulting from the delay caused by unseaworthiness. It would be most inequitable, we respectfully submit, to award them the still greater sum claimed on the incorrect hypothesis that their cargo became a total loss because the United

States Government levied an embargo, which both courts below have found prevented the schooner from obtaining her clearance and actually proceeding to Bordeaux and delivering the cargo to the consignees.

As we have shown above, there is no real question of law involved in this case. The decision turned on the single question of fact found by both courts below that the schooner would in fact have sailed from Havana for Bordeaux and delivered the cargo if the American Consul at Havana, in carrying out the United States Government's Embargo, had not refused clearance.

Nor is there any conflict between the decision below and any decision of this Court or of the Circuit Court of Appeals of any other Circuit. The decisions cited in the brief supporting the petition are simply irrelevant to the present case because they either do not involve the question of illegality or their facts are plainly distinguishable.

The opinion of the trial court in the case of the schooner *Henry W. Cramp, Francis J. McDonald, claimant*, v. *Albert T. Rosasco*, was ~~decided and~~ filed before either the briefs were submitted or this case argued in the Circuit Court of Appeals and none of the several counsel who appeared separately in that court, considered it relevant enough to cite. The *Henry W. Cramp* is obviously distinguishable because in that case there was a positive, intentional act of deviation by the shipowner in ordering the master of the schooner to put into the port of Norfolk and not to perform the voyage. The Circuit Court of Appeals found as a fact that this act of the shipowner was wholly unexplained. The Circuit Court of Appeals said (Petitioner's brief, p. 27):

> "It is unfortunate for the schooner that the master is dead, by reason of there being no proof by him, and that no one on board the vessel could be found, in spite of search, to prove any of the acts necessitating the vessel seeking harbor at Norfolk, but the failure of the vessel to give any notice of her going to Norfolk and remaining there more than two months without informing the charterers, and doing so then only on inquiry by the charterers, is a course of unexplained conduct not calculated to inspire confidence in the alleged purpose of the vessel to complete this contract of affreightment."

A reading of the opinions of the courts below in the present case will disclose the obvious fact that there is no evidence whatever that the respondent here committed any intentional, unexplained act such as was committed by the owner of the *Henry W. Cramp*. This is pointed out very clearly by the Circuit Court of Appeals in its opinion in the present case. The distinction is "plain" between a case such as the *Henry W. Cramp*, in which there is an intentional unexplained act of the owner of a schooner in ordering her master not to continue performance of the voyage, and a case such as the present in which the uncontradicted evidence as recited in the opinion of the Circuit Court of Appeals, shows that it was only after the master of the *Malcolm Baxter, Jr.* had proceeded with the schooner for a distance of almost 600 miles, that he believed that it was necessary to put into a port of refuge.

An examination of the opinion of the Circuit Court of Appeals shows that it relied upon the doctrine in *Kish* v. *Taylor*, 1912 App. Cas. 604 (House of Lords). The facts in that case were thus stated:

> "Unfortunately, he (the master) overloaded his ship with deck cargo to such an extent as to make her unseaworthy. She proceeded to sea, encountered bad weather, and, by reason of her overloaded condition, her master was obliged, in order to save his vessel and the lives of his crew, to take refuge in the port of Halifax. Some of the deck cargo was carried overboard, other portions were jettisoned, other portions damaged, and the vessel herself was so damaged that it was absolutely necessary to have some repairs done upon her and to have a portion of her cargo restowed. The owners have paid for these repairs, and have compensated the owners of the lost, jettisoned, and damaged cargo for the loss they have sustained, and do not claim from any one concerned any contribution on foot of the expenditure thus resulting from their improper act in overloading their ship" (1912 A. C. 604).

In delivering judgment, Lord Atkinson, who spoke for the House of Lords, said:

> "So that the question for decision resolves itself into this: Is it the presence of the peril and not its cause which determines the character of the deviation, or must the master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to chose between such alternatives."

The law as thus laid down by the House of Lords has been followed by the Circuit Court of Appeals for the Fourth Circuit in *The Turret Crown*, 284 Fed. 439; certiorari denied, 262 U. S. 742; and *The Turret Crown*, 297 Fed. 766, certiorari denied, 264 U. S. 591. Indeed, the principle is now accepted not only in this country but in England as firmly established.

There is nothing in the case of *The Henry W. Cramp* which in any way affects the principles involved in this case. In that case there was a positive finding of fact that when the master sailed he intended to deviate. In the present case, there was a positive finding of fact by the Circuit Court of Appeals that when the master left New Orleans he did not intend to deviate but honestly thought he could make the trip in safety. The distinction, as the Court below pointed out, is plain. It said:

> "The Schooner 'Malcolm Baxter, Jr.,' was purchased by the appellant (respondent here) after she had commenced loading for the voyage in question, and no officer of the appellant inspected the vessel before the voyage in question commenced, nor was she drydocked or subjected to an extensive survey. On August 16, 1917, the schooner sailed from New Orleans. The schooner was towed down to the mouth of the Mississippi River, without meeting any severe weather, and came to anchor at Port Eads, where she remained until August 23, 1917. After the schooner had been towed down the river to Port Eads and anchored, a leak forward was discovered and reported to her master. The master exercised his judgment and instead of returning to New Orleans proceeded on his voyage. The leak grew worse, and

after he had sailed 658 miles, he put into Key West, on September 1, 1917, for repairs" (R., p. 1166).

The Court further said: (1168)

"The master of the 'Baxter' did not leave New Orleans with the knowledge that he would have to make a port for repairs, but honestly thought he could make the trip in safety, and tried unsuccessfully so to do. The leak was not discovered until after the ship had left New Orleans and anchored at Port Eads, and it was the condition of the ship and intention of her master when she left New Orleans, and not when she left Port Eads, that is controlling. If going into Key West or Havana for repairs constituted voluntary deviation, then returning to New Orleans from Port Eads for repairs would have constituted voluntary deviation, and when the ship broke ground at Port Eads, she would have had no option but to deviate. To oblige a master of a ship to choose between such alternatives has been condemned. *Kish* v. *Taylor* (1912) A. C. 604, 614. Even when the ship broke ground at Port Eads, the master was not certain that he would be compelled to seek a port of refuge.

To seek a port of refuge, if in the judgment of the master the safety or best interests of crew, ship, or cargo requires it, when a ship is unseaworthy from unfitness of structure, is not a deviation. *Turret Crown*, 297 Fed. 766. In the last cited case we follow the House of Lords, in *Kish* v. *Taylor, supra*, which was a case of unseaworthiness from overload-

ing, and in which case it was held that it is the presence of the peril, and not its cause, which determines the character of the deviation. The Circuit Court of Appeals in the Fourth Circuit also followed *Kish* v. *Taylor, supra*, in *Turret Crown*, 284 Fed. 439.

This holding is not inconsistent with the decision of the Supreme Court in *Willdomino*, 272 U. S. 718, and the House of Lords in *United States Shipping Board* v. *Bunge y Born, Ltd.*, (1925) 31 Com. Cas. 118, in which cases the deviations were caused by the ships leaving port with insufficient fuel.

The distinction is plain. If circumstances under which the ship leaves port are such that it must be known that she will be compelled to deviate, *e. g.*, a shortage of fuel, the deviation is voluntary. If, however, the ship leaves port unseaworthy, which includes one badly stowed, even if it was known, she does not voluntarily deviate if she seeks a port of refuge. We, therefore, hold that the schooner did not voluntarily deviate when she sought a port of refuge at Key West or Havana."

We have quoted at length from the opinion of the Circuit Court of Appeals because we feel that the statement of facts found by the Circuit Court of Appeals, and of the case generally as presented in the Petition for Certiorari, is so meagre that it is quite unfair to that court. It is manifest from reading the opinion of that court that all it did was to find facts which brought the case squarely within a doctrine of the maritime law well established both in the United States and in England.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

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